

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ANDREW B. HENSON**

Claimant

VS.

**BELGER CARTAGE SERVICE, INC.**

Self-Insured Respondent

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Docket No. 1,030,241

**ORDER**

Respondent appeals the January 29, 2008 Award of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was awarded benefits for a 9 percent permanent partial disability on a functional basis for injuries suffered on August 29, 2005, after the ALJ determined that the medical opinion of George G. Flutter, M.D., claimant's expert, was the most credible.

Claimant appeared by his attorney, Beth Regier Foerster of Topeka, Kansas. Respondent, a self-insured, appeared by its attorney, Douglas C. Hobbs of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on April 15, 2008.

**ISSUE**

What is the nature and extent of claimant's injuries? Claimant was awarded a 9 percent permanent partial disability on a functional basis after the ALJ determined that Dr. Flutter's opinion was the most credible. Respondent argues that the opinions of claimant's treating physician, Daniel J. Prohaska, M.D., and the court appointed independent medical examiner, Paul S. Stein, M.D., should carry more weight than claimant's hired expert. Claimant has returned to work for respondent earning at least

90 percent of his pre-injury wage. Therefore, his award will be limited to his percentage of functional impairment.<sup>1</sup>

### FINDINGS OF FACT

Claimant had worked as a heavy hauler for respondent for 17 years. This job required that claimant move all kinds of equipment. On August 29, 2005, claimant was working with two co-workers, moving a cabinet weighing 1,200 pounds, when one of the forklifts moving the cabinet hit the cabinet. This caused the cabinet to move, kicking it out of claimant's arm. Claimant felt a pop in his right shoulder and experienced burning down his right arm. Claimant finished work that day, and went home. The next day, claimant could not pick up anything. He was referred to the clinic at Via Christi,<sup>2</sup> where x-rays were taken of his right shoulder and back. Claimant was placed on light duty, which respondent accommodated by placing claimant in the office doing bidding work and helping the salesmen.

Claimant was referred for physical therapy, which claimant stated made his condition worse. Claimant was referred for an MRI and sent to neurosurgeon Matthew Henry, M.D. Claimant was told that he had a "disc out"<sup>3</sup> and that he needed to see a shoulder specialist.

Claimant was referred by respondent's workers compensation adjuster to board certified orthopedic surgeon Daniel J. Prohaska, M.D. The first examination with Dr. Prohaska was on December 22, 2005. Claimant's chief complaints to Dr. Prohaska were in the right shoulder. Claimant had a normal range of motion and no impingement signs, but did have signs of interarticular derangement of the labrum. X-rays revealed no abnormalities. Dr. Prohaska initially diagnosed possible interarticular labral tear versus possible cervical radicular pain, with thoracic outlet syndrome likely secondary to positional change. By the time claimant was examined by Dr. Prohaska on January 10, 2006, the MRI had been completed. The test did indicate some labral signal change anteriorly without instability. However, Dr. Prohaska considered this normal in a 47-year-old man. By the next visit on February 7, 2006, claimant had been to additional physical therapy which, this time, was very helpful. Claimant's strength was nearly back to normal. His range of motion and strength were normal.

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<sup>1</sup> K.S.A. 44-510e(a).

<sup>2</sup> Via Christi Occupational & Environmental Medicine. (See Dr. Stein's report at 1.)

<sup>3</sup> Fluter Depo., Ex. 2 at 2 (Dr. Fluter's August 17, 2006 report).

Claimant was released without restrictions and instructed to return on an as needed basis. Claimant never returned to Dr. Prohaska for additional treatment. Dr. Prohaska determined, based on the last examination, that claimant had suffered no permanent impairment from this incident. Dr. Prohaska agreed that the MRI indicated mild cervical narrowing at C6-7 which could potentially cause symptoms. However, he felt that claimant's symptoms were more likely coming from his thoracic outlet, which resolved after physical therapy.

Dr. Prohaska agreed that claimant's range of motion was 170 degrees. He stated that this was within the normal range pursuant to the fourth edition of the *AMA Guides*,<sup>4</sup> but also agreed the *Guides* could give a 1 percent impairment for flexion at 170 degrees. He also noted that claimant's left shoulder also had a 170-degree range of motion. He felt this was further evidence that 170 degrees was within normal limits for claimant. Dr. Prohaska assessed no impairment to claimant's cervical spine.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist George G. Fluter, M.D., on August 17, 2006, with a return examination on July 30, 2007. Dr. Fluter stated the MRI showed an abnormal appearance of the superior labrum consistent with a non-displaced tear. He also found spondylosis at C5-6 and C6-7 with mild central canal narrowing and neuro-foraminal stenosis bilaterally at C6-7. Claimant's range of motion in his neck was slightly limited, and shoulder impingement testing was positive bilaterally. Claimant continued to experience pain daily which he described as sharp, shooting, burning, dull and aching. Dr. Fluter diagnosed bilateral shoulder pain, bilateral upper extremity pain and neck pain, myofascial. He rated claimant at 6 percent to the right upper extremity which converts to 4 percent of the whole body, and 5 percent for the neck. Combining the shoulder and neck ratings calculates to a 9 percent permanent partial disability on a functional basis. Dr. Fluter also gave claimant a 1 percent whole body impairment for headaches for a total whole body impairment of 10 percent.

Dr. Fluter examined claimant a second time on July 30, 2007. Claimant exhibited improved strength in his right upper extremity. Additionally, the headaches seemed associated with tightness and swelling in the neck. Dr. Fluter advised claimant to avoid holding his head and neck in awkward or extreme positions and was to restrict activities at or above shoulder level to an occasional basis. After the July 30, 2007 examination, Dr. Fluter diagnosed claimant with headaches, most likely cervicogenic, and myofascial neck pain. Claimant still had some range of motion loss in his right shoulder. The remainder of the shoulder examination was normal bilaterally. Plus, claimant's neck muscle strength and bulk were within normal functional limits in July 2007. There were no

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<sup>4</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

trigger points at that examination. At the time of the second examination, claimant's headaches were no longer occurring daily. Dr. Fluter also acknowledged that there was no table in the *AMA Guides* for rating headaches.<sup>5</sup>

Claimant was referred by the ALJ to board certified neurological surgeon Paul S. Stein, M.D., for an examination on May 23, 2007. Dr. Stein's report indicated claimant suffered from intermittent headaches which had improved with a change in sleeping habits. Claimant was using a smaller pillow and sleeping in a different position. Claimant also denied persistent neck, shoulder or arm pain. Claimant did experience tingling in the right upper extremity down to the index finger and sometimes the thumb.

Dr. Stein reviewed both MRIs diagnosing persistent straightening of cervical lordosis and degenerative disk disease at C5-6/C6-7 with bilateral foraminal stenosis and mild central stenosis. The MRI-Arthrogram of the right shoulder indicated an abnormal appearance to the superior labrum consistent with a non-displaced tear. Range of motion of the shoulders was normal, without crepitus. Impingement testing was also normal. Cervical range of motion was normal except for a mild decrease in rotation. There was no trigger point tenderness and no cervical paraspinal or trapezius muscle spasm. Dr. Stein determined that claimant had suffered a soft tissue strain around the neck and right shoulder. He found claimant at maximum medical improvement, with both the shoulder and neck symptoms resolved. Claimant was given no work restrictions and assessed no permanent impairment of function for the injury suffered on August 29, 2005.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>6</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>7</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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<sup>5</sup> Fluter Depo. at 50.

<sup>6</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>7</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>8</sup>

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.<sup>9</sup>

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>10</sup>

Claimant has returned to work for respondent at a comparable wage and, under K.S.A. 44-510e(a), is limited to his functional impairment. The ALJ found the opinion of Dr. Fluter to be the most credible. However, the rating provided by Dr. Fluter came as the result of the examination on August 17, 2006. The second examination by Dr. Fluter on July 30, 2007, found claimant to be improved. Claimant's range of motion was better in both the shoulders and neck, claimant's headaches were intermittent and the trigger points were non-existent the second time. However, when asked if his impairment rating had changed, Dr. Fluter only discussed that he was considering adding a small impairment related to the headache component.<sup>11</sup> Additionally, neither Dr. Prohaska, claimant's treating physician, nor Dr. Stein, the court appointed IME doctor, found claimant to have any impairment.

Respondent argues that claimant should be denied any permanent impairment based on Dr. Prohaska's and Dr. Stein's opinions. But the Board is not convinced that those opinions should be adopted *in toto* either. Dr. Prohaska agreed that a 1 percent impairment was possible under the AMA *Guides* for the shoulder range of motion limitations and Dr. Prohaska did not evaluate or rate claimant's cervical complaints. Dr. Stein agreed that the MRI-Arthrogram of the right shoulder was abnormal with a possible superior labrum consistent with a non-displaced tear. Additionally, claimant displayed a persistent straightening of his cervical lordosis and degenerative disk disease at C5-6/C6-7, with bilateral foraminal stenosis and mild central stenosis. Dr. Fluter

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<sup>8</sup> K.S.A. 2005 Supp. 44-501(a).

<sup>9</sup> K.S.A. 44-510e.

<sup>10</sup> K.S.A. 44-510e(a).

<sup>11</sup> Fluter Depo. at 23.

felt the August 29, 2005 injury represented an aggravation of claimant's underlying cervical condition.<sup>12</sup>

It is well established under the Kansas Workers Compensation Act that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>13</sup>

The Board finds claimant's injuries resulted in permanent disability, but the opinion of Dr. Fluter appears unsupported by this record. However, the zero percent opinions of both Dr. Prohaska and Dr. Stein are also not justified by this record. The actual impairment is somewhere in between. In considering the opinions of Drs. Prohaska, Stein and Fluter, the Board finds claimant suffered a 5 percent permanent partial disability to the whole body on a functional basis from the injuries suffered on August 29, 2005, while working for respondent. The Award of the ALJ is modified accordingly.

The dissenting Members of the Board contend claimant's award should be split, with separate calculations for any whole body portion of the award and separate calculations for any scheduled members. This contention is contrary to the Supreme Court's discussion in *Bryant*,<sup>14</sup> which states:

If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.<sup>15</sup>

Pursuant to *Bryant*, the majority will combine the scheduled and nonscheduled ratings and award claimant compensation for a permanent partial disability under K.S.A. 44-510e.

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<sup>12</sup> Fluter Depo. at 20.

<sup>13</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

<sup>14</sup> *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

<sup>15</sup> *Id.* at 689.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 5 percent permanent partial disability to the whole body on a functional basis for the injuries suffered on August 29, 2005.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 29, 2008, should be, and is hereby, modified to award claimant a 5 percent permanent partial disability to the whole body on a functional basis for the injuries suffered on August 29, 2005.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Andrew B. Henson, and against the respondent, Belger Cartage Service, Inc., a self-insured, for an accidental injury which occurred on August 29, 2005, and based upon an average weekly wage of \$836.67.

Claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of \$467.00 per week or \$9,690.25 for a 5 percent permanent partial whole body disability. As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

The majority awards claimant a 5 percent permanent partial disability to the body as a whole for his injuries without specifying what those injuries are and without specifying what percentage of permanent impairment of function claimant has suffered for which injury. The 5 percent is a compromise or a split of Dr. Prohaska's zero percent, Dr. Stein's zero percent and Dr. Fluter's 10 percent total rating opinions. Dr. Fluter rated claimant's right shoulder, neck and head (headaches). The Kansas Supreme Court in *Casco*<sup>16</sup> emphasized that scheduled injuries are the general rule and nonscheduled injuries are the exception. Accordingly, if an injured body part is on the schedule in K.S.A. 44-510d, then the compensation for that injury must be calculated pursuant to that schedule. The shoulder is on the schedule.<sup>17</sup> Therefore, any portion of the permanent partial disability awarded by the majority that corresponds to the permanent impairment rating for the shoulder must be calculated pursuant to K.S.A. 44-510d(a)(13). The neck and head are not contained within the schedules of K.S.A. 44-510d. Injuries to the neck and head are unscheduled injuries. Accordingly, the portion of the 5 percent permanent partial disability award that corresponds to the neck and head injuries should be calculated pursuant to K.S.A. 44-510e.

Nowhere does K.S.A. 44-510d say that scheduled injuries that occur simultaneously with nonscheduled injuries should be compensated as general body disabilities under

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<sup>16</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 10, 154 P.3d 494, rev. denied \_\_\_\_ Kan. \_\_\_\_ (2007).

<sup>17</sup> K.S.A. 44-510d(a)(13).



K.S.A. 44-510e. By combining the impairment rating for claimant's scheduled injury to his shoulder with the ratings for his unscheduled injuries to his neck and head, the majority is reading something into K.S.A. 44-510d that is not in the statute. *Casco* requires that combinations of scheduled injuries be compensated separately regardless of whether the injuries occurred separately, simultaneously, or as a result of a natural progression. Likewise, K.S.A. 44-510d and K.S.A. 44-510e should be applied separately, such that combinations of scheduled and nonscheduled injuries should be compensated separately.

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BOARD MEMBER

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BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent  
Nelsonna Potts Barnes, Administrative Law Judge